

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF VIRGINIA
3 ALEXANDRIA DIVISION

4 IN RE: LUMBER LIQUIDATORS) MDL No. 1:15-md-02627
5 CHINESE-MANUFACTURED)
6 FLOORING PRODUCTS MARKETING,) Alexandria, Virginia
7 SALES PRACTICES AND) December 1, 2015
8 PRODUCTS LIABILITY) 2:00 p.m.
9 LITIGATION)
10)) Pages 1 - 83

11 TRANSCRIPT OF DEFENDANT LUMBER LIQUIDATORS, INC.'S
12 MOTION TO DISMISS FIRST AMENDED REPRESENTATIVE CLASS
13 ACTION COMPLAINT AND TO STRIKE PLAINTIFFS' REQUEST FOR
14 INJUNCTIVE RELIEF CLASSES
15 BEFORE THE HONORABLE ANTHONY J. TRENGA
16 UNITED STATES DISTRICT COURT JUDGE
17 AND THE HONORABLE THOMAS RAWLES JONES, JR.
18 UNITED STATES MAGISTRATE JUDGE

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25 COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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1 THE CLERK: Case No. 1:15-md-2627, *In Re:*
2 *Lumber Liquidators Chinese-Manufactured Flooring*
3 *Products Marketing, Sales Practices and Products*
4 *Liability Litigation.*

5 Will counsel please identify themselves for
6 the record.

7 MR. TOLL: Good afternoon, Your Honors. I'll
8 save everyone else from getting up. This is Steven
9 Toll, Colead Counsel Nancy Fineman and Steve Berman,
10 and in the second row, Douglas McNamara from my office,
11 and Frank Balint on one of the other Eastern District
12 of Virginia cases.

13 JUDGE TRENGA: All right. Welcome.

14 MR. STERN: Good afternoon, Your Honors. May
15 it please the Court. My name is William Stern for the
16 colead defense counsel, and with me is Bethany Lukitsch
17 and Diane Flannery from McGuireWoods.

18 JUDGE TRENGA: All right. Welcome to
19 everyone for our status conference. What I'd like to
20 do is work from the agenda.

21 But before I do that, let me just confirm
22 with our CourtCall representative that we do have a
23 good connection. Is someone from CourtCall on the
24 line?

25 COURTCALL REPRESENTATIVE: This is the

1 CourtCall operator, Your Honor, and we do have a good
2 connection.

3 JUDGE TRENGA: All right. Thank you.

4 COURTCALL REPRESENTATIVE: You're welcome.

5 JUDGE TRENGA: The first item is the oral
6 argument on the motion to dismiss. I'm going to take
7 that up last after we go through the rest of the
8 agenda.

9 I did meet with lead counsel in chambers.
10 What I'd like to do is go through each of these items
11 and have counsel summarize what we discussed. Given
12 the nature of some of these items, I'm going to call on
13 the defendants first but ask both sides to put on the
14 record anything they think needs to fairly be stated.

15 Let me begin with the status of the
16 non-laminate cases.

17 Ms. Flannery.

18 MS. FLANNERY: Yes, Your Honor. There's one
19 remaining non-Chinese laminate case pending. That is
20 the *Vincent* case. Defendants have requested an
21 opportunity to file a motion to dismiss with respect to
22 the *Vincent* class action, and it's our understanding
23 that our motion to dismiss will be due January 12.

24 JUDGE TRENGA: Yes. I've set a filing date
25 for that motion on January 12, and it should be

1 responded to by the plaintiff as required under our
2 local rules.

3 MS. FLANNERY: Thank you, Your Honor.

4 We're not aware of any other remaining
5 actions alleging any other product other than Chinese
6 laminate.

7 JUDGE TRENGA: All right. Very good.

8 The status of the state cases, would you like
9 to address that as well?

10 MS. FLANNERY: Yes. There are eight state
11 court cases where individual plaintiffs are pursuing
12 claims based on Chinese laminate. We're working with
13 plaintiffs to pursue a course of cooperation and trying
14 to take advantage of the discovery that's being done in
15 the MDL.

16 Our next step in the process would be to
17 provide the plaintiffs' cocounsel in those individual
18 cases copies of our confidentiality agreement that you
19 have signed off on in this case. Thereafter we'll also
20 be sending a letter to them telling them how they'll be
21 able to participate and access the data that's been
22 produced here.

23 JUDGE TRENGA: All right. Thank you.

24 With respect to the discovery, why don't you
25 go ahead and summarize your position on that and where

1 we are, and I'll ask Mr. Toll then to supplement any
2 matters he thinks needs to be put on the record.

3 MS. FLANNERY: Sure. With respect to
4 document production, the parties and the Court have
5 discussed the status of document discovery and
6 privilege issues, and we've developed a procedure for
7 moving forward with those privilege issues. Currently
8 the first privilege-related motions will be jointly
9 filed by the parties on December 18.

10 JUDGE TRENGA: All right.

11 MS. FLANNERY: The second issue concerns
12 plaintiffs' fact sheets. There are a number of
13 plaintiffs who have not yet provided fact sheets, nor
14 provided documents in connection with those fact
15 sheets. Defendants will be filing a Rule 37 motion
16 this week requesting that plaintiffs produce these fact
17 sheets or any documents that they may have in their
18 possession that they plan to rely upon in this
19 litigation by December 18 and asking the Court to
20 consider sanctions should plaintiffs fail to provide
21 the requested fact sheets specifically.

22 JUDGE TRENGA: All right. Those motions will
23 be referred to Judge Jones in accordance with our
24 ordinary practice.

25 MS. FLANNERY: Thank you, Your Honor.

1 JUDGE TRENGA: Mr. Toll, is there anything
2 you'd like to add to any of those agenda items?

3 MR. TOLL: The only thing, Your Honor, just
4 for the record, you'll note that we've been in touch
5 with plaintiffs' counsel in the *Vincent* case trying to
6 talk to him about, you know, the best method to
7 proceed. He has expressed some willingness to remand
8 his case, but we're not sure yet whether that's on an
9 individual or class basis.

10 So if it is on an individual basis, that may
11 mute what the defendants -- if it's acceptable to the
12 defendants -- which I believe it will be -- and to the
13 Court, it would remove that case, or it would be
14 remanded back and there would be no need for their
15 motion. We don't know yet if he's willing to do that.

16 With regard to the in-state cases, the
17 individual claims being brought there, we will set up a
18 procedure to allow access, probably for a cost, through
19 our vendor to get documents that, you know, have been
20 produced by defendants to us as well.

21 And with regard to the last item Ms. Flannery
22 raised, again, we're generally in agreement that that
23 is the process we'll proceed forward with on the
24 privilege documents, and we will send -- with regard to
25 the fact sheets, we will send out something tomorrow by

1 e-mail to all the plaintiffs' counsel kind of reminding
2 those who have not yet completed the fact sheets that
3 they ought to do so promptly or be subject to a motion
4 and also to be in touch with those who have not yet
5 produced documents, that if they have responsive
6 documents, they should produce those. So we'll follow
7 up tomorrow.

8 JUDGE JONES: You can quote me as saying
9 they're treading on the edge of disaster.

10 MR. TOLL: I'll quote that. Thank you, Your
11 Honor.

12 JUDGE TRENGA: All right. With respect to
13 Item 5, appointment of liaison counsel for the Virginia
14 cases, there have recently been a number of voluntary
15 dismissals. We are now down to only two Virginia
16 cases, one of which is involving Mr. Balint, who is
17 here, and one other case. In light of those numbers,
18 I'm not going to make a formal appointment of liaison
19 or lead counsel for those cases but simply ask that
20 Mr. Balint -- and I believe it's Mr. Wise in the other
21 case -- continue their close coordination with
22 plaintiffs' counsel.

23 Mr. Balint, did you want to say something
24 about this?

25 MR. TOLL: One thing, Your Honor.

1 JUDGE TRENGA: All right.

2 MR. TOLL: We went over this just briefly.
3 I'm told there could be a third case that still is on
4 the docket, an Eastern District of Virginia case. So
5 that's the one thing I'm not certain about.

6 JUDGE TRENGA: All right.

7 MR. TOLL: Mr. Balint, what's the name of
8 that one?

9 MR. BALINT: It's the *Kumar* case, Dennis
10 Reich is the attorney on that.

11 JUDGE TRENGA: Who is the attorney? Why
12 don't you come forward and identify yourself for the
13 record.

14 MR. BALINT: Good afternoon, Your Honor.
15 Frank Balint.

16 JUDGE TRENGA: Yes.

17 MR. BALINT: So in anticipation of this
18 appointment process, I had caucus with all of the EDVA
19 plaintiffs. That, as you have seen, has led to a
20 number of voluntary dismissals. The flock has shrunk
21 considerably. As I understand it, we're down to two
22 cases. The *Johnson* case, which is our case, with a
23 Massachusetts plaintiff, and the *Kumar* case, which is
24 Mr. Reich, R-E-I-C-H. He's the lead attorney on that
25 case, and that is an Ohio plaintiff in that case.

1 Also, I don't believe I've seen the motion to
2 dismiss filed yet or the voluntary dismissal filed yet,
3 but I believe the *Marmonti* case will be dismissed.

4 JUDGE TRENGA: All right. That's the only
5 other one I had. I did not have the Reich case down.
6 If you would, continue to coordinate with those
7 lawyers.

8 MR. BALINT: I'm happy to do that, Your
9 Honor.

10 Also, I hope I'll have an opportunity to talk
11 to Judge Jones a little bit about scheduling, making
12 some unique scheduling in connection with the EDVA
13 cases.

14 JUDGE TRENGA: All right.

15 MR. BALINT: Thank you, Your Honor.

16 JUDGE TRENGA: The only other agenda item was
17 discussion on the submission of attorney's fees orders.
18 I've met with plaintiffs' counsel, and they're going to
19 bring to my attention any formal action that may be
20 appropriate as we proceed through this process.

21 All right. Anything else about any of the
22 agenda items?

23 MR. TOLL: No, Your Honor.

24 JUDGE TRENGA: All right.

25 MR. STERN: No, Your Honor.

1 JUDGE TRENGA: All right. That leaves the
2 motion to dismiss and oral argument.

3 JUDGE JONES: I will retire from the bench.

4 Mr. Balint, if you wouldn't mind meeting me
5 in Judge Trenga's chambers for a couple of minutes.

6 MR. BALINT: Sure. I'm happy to do that.

7 JUDGE JONES: Then we'll proceed with what we
8 need to do and whether we can do it now.

9 JUDGE TRENGA: All right.

10 (Judge Jones and Mr. Balint exit.)

11 JUDGE TRENGA: We have Lumber Liquidators'
12 motion to dismiss the first amended representative
13 class action complaint and to strike plaintiffs'
14 request for injunctive relief, which is Docket
15 Number 597. I've reviewed the briefing and would be
16 pleased to hear further from counsel.

17 Mr. Stern.

18 MR. STERN: Thank you, Your Honor.

19 Your Honor, I plan to address three issues.
20 I've chosen the three issues because the resolution of
21 these three issues is in some ways a threshold or
22 gateway decision that could unlock some of the other
23 state-by-state issues. It's not that those other
24 issues are ones I'm disregarding. I'm perfectly
25 available to answer the Court's questions.

1 Let me identify first what the three issues
2 are. The first issue I plan to address is what does
3 the California regulation that's at issue here require
4 and how does the first amended representative class
5 action complaint measure up.

6 The second issue is the false advertising or
7 affirmative misrepresentation allegations in the
8 representative complaint: Do they state a claim as
9 measured by Article III standing and by the
10 particularity of requirements of Rule 9(b)?

11 I'm going to pause there, and I'll identify
12 the third issue in a moment.

13 The resolution of those two issues will in
14 many ways resolve some of what I call the nested issues
15 in some of the state-by-state claims because all of
16 them in many ways turn on these threshold issues, these
17 two threshold issues.

18 The third issue is the declaratory judgment
19 claim. Let me take that one up first because I don't
20 have a lot to say about it. The question there is
21 whether the declaratory judgment claim disposes of the
22 entire dispute. The one thing about which I think both
23 parties agree is that were this Court to enter
24 declaratory judgment, it would not dispose of the
25 entire dispute. And for that reason alone, we think

1 that claim should be dismissed.

2 I will say this: That embedded inside that
3 declaratory judgment claim is really plaintiffs'
4 interpretation of how the California regulation works.
5 So in many ways, this folds back to the first argument
6 which I'm about to address. But we don't even need to
7 get there because I think neither side really disputes
8 that this claim would not dispose of the entire cause
9 of action.

10 So with that introduction and road map, let
11 me first turn to the first issue, which is what does
12 the California regulation require and does the
13 representative complaint measure up. The parties have
14 strikingly different views about what the California
15 regulation or the Airborne Toxic Control Measures, the
16 ATCM, what it requires.

17 If our view is correct, then the complaint
18 can't stand as pled, and it will need to be replied.
19 That's what I plan to address today: What does the
20 ATCM require, and does the representative complaint
21 measure up? And if it doesn't, why not?

22 I have prepared a hand-up which I gave to the
23 Court prior to the hearing.

24 JUDGE TRENGA: I do have it.

25 MR. STERN: It's kind of -- if I may refer to

1 it as sort of an idiot's guide to the ATCM, and I say
2 that with no disrespect to the Court. Mr. Berman and
3 I, plaintiffs' counsel and I have been working with the
4 ATCM longer than the Court has, and it's not an easy
5 regulation to penetrate, at least not at first blush.
6 It takes several passes through it. What I have handed
7 up is a shortened version of just those provisions that
8 I think I'm going to address and that are relevant to
9 the motion to dismiss.

10 Coincidentally, I noticed that Mr. Berman is
11 also going to have a handout, which is the entire ATCM
12 measure, and plaintiffs also have highlighted the
13 relevant provisions. And not surprisingly, his
14 highlights pretty closely match my hand-up. So I don't
15 think we disagree about what the pertinent provisions
16 are going to be.

17 There is a lot of density and clutter in the
18 ATCM. Let me give a brief overview of how we believe
19 it operates. There are a number of Airborne Toxic
20 Control Measure regulations that have been promulgated
21 by the California Air Resources Board. They're all
22 very specific. They've all been promulgated pursuant
23 to an enabling statute.

24 The one we're interested in concerns very
25 specifically formaldehyde emissions from CWP. CWP is

1 the shorthand for composite wood products, the type of
2 product we're talking about here. So it's product
3 specific, and it's formaldehyde specific. It's found
4 at 17, Code of California Regulations -- and while
5 there are 12 subparts, all of them are preceded by the
6 Section 93120, and then it proceeds .1 through .12.

7 If one were to start from scratch and look at
8 how one were to unbundle the responsibilities or
9 liabilities of an actor in Lumber Liquidators' position
10 in this case, where do you start? The ATCM really
11 divides -- if you think about it this way, it
12 divides --

13 JUDGE TRENGA: Mr. Stern, I've gotten a
14 notice that it's a little difficult for the CourtCall
15 connection to pick up your voice. So maybe you can
16 adjust the microphone a little bit and either speak
17 more directly into it or raise your voice slightly.

18 MR. STERN: Or stop wandering around. I
19 notice that I've been doing that. I'll try and hang on
20 and stay close to the microphone. Thank you.

21 JUDGE TRENGA: All right.

22 MR. STERN: There are essentially two types
23 of provisions setting aside the definitions in some of
24 the other general provisions. There are provisions
25 that deal with the type of actor, and then there are

1 provisions that deal with the product.

2 So where would one start if you were to face
3 this issue for the first time and you were to ask
4 yourself: What are the responsibilities of an actor,
5 such as Lumber Liquidators, under this ATCM? You would
6 first start, I think, by asking yourself: Well, what
7 type of entity is Lumber Liquidators?

8 And you'd go to the definition section, and
9 you would find that under the ATCM, there are at least
10 five different types of actors who deal with composite
11 wood products. There is a subset of provisions dealing
12 with manufacturers and another one dealing with
13 fabricators.

14 Let me pause there for a moment. In this
15 case, it's not --

16 JUDGE TRENGA: Let me ask a question: Why
17 would Lumber Liquidators not fit the definition, as
18 well, of a distributor?

19 MR. STERN: It could be a distributor. It
20 could also be an importer.

21 JUDGE TRENGA: All right.

22 MR. STERN: For our purposes, it doesn't much
23 matter. I think plaintiffs and we agree we're probably
24 a retailer.

25 JUDGE TRENGA: All right.

1 MR. STERN: But the provisions of any of
2 those three are really the same for purposes of this
3 discussion. Okay.

4 JUDGE TRENGA: All right.

5 MR. STERN: In this case, the manufacturer in
6 the definitions refers to the company that makes the
7 MDF, the medium density fiberboard. The Court may
8 recall from a couple of sessions ago I had brought with
9 me -- as a show-and-tell, I brought several examples of
10 an MDF piece of flooring which had the MDF core.
11 That's called the CWP or composite wood product, and on
12 top of that, it had the laminate. The top could also
13 be a wood veneer. In this case, they all happen to be
14 laminate.

15 So the manufacturer makes the core, and in
16 this case, the manufacturers were all from China. They
17 don't have to be. They could be domestically produced,
18 but in this case, all of the products at issue, the
19 manufacturer was from China.

20 Once that floor is manufactured --

21 JUDGE TRENGA: The same manufacturer?

22 MR. STERN: Different.

23 JUDGE TRENGA: Different manufacturers?

24 MR. STERN: Yes.

25 Once the manufacturer produces the core, it

1 then moves on to the fabricator, and the fabricator is
2 the entity that finishes the product. And in this
3 case, what that means is the fabricator puts the
4 laminate on top and is responsible for stickering the
5 product, putting that CARB sticker on the product that
6 we'll talk about in a moment.

7 The fabricators in this case were also from
8 China. Again, they don't have to be. There can be
9 domestic or European produced fabricators, but in this
10 case, they happen to be from China.

11 So once you leave the manufacturer and
12 fabricator world, then we get into the world of the
13 downstream distributors and the downstream players and
14 actors, and those include distributors, retailers, and
15 importers.

16 Lumber Liquidators is probably a retailer.
17 If you look at the definition in the selected
18 provisions, the definition of retailer is in .1(38),
19 we're probably a retailer. Again, it doesn't much
20 matter.

21 So with that as sort of a general background,
22 where do we start? I would submit we start with the .8
23 section called Requirements for Retailers, which is the
24 first section I've given the Court in the three-page
25 handout called Selected Provisions of the ATCM.

1 The requirements for retailers are twofold
2 under .8, there's .8(a) and .8(b). So .8(a) is an
3 emissions standard, and it says, All retailers must
4 comply with the requirements of section -- I'm going to
5 truncate this -- .2(a). My contention -- and I don't
6 think this is disputed -- is that .8(a) has no
7 independent content. For that content, one needs to
8 look at .2(a) which I'm going to talk about in a
9 minute.

10 So what about .8(b)? So .8(b) says,
11 Retailers -- who you'll recall are a downstream player
12 in this scenario -- must take reasonable prudent
13 precautions to ensure that the composite wood products
14 and the composite wood products contained in finished
15 goods that they purchase comply with the emission
16 standards. That's the product standard, and that goes
17 on to describe what those reasonable prudent
18 precautions are.

19 So before I get too deeply into what these
20 embedded requirements are --

21 JUDGE TRENGA: What about the last sentence
22 of .8(b)?

23 MR. STERN: Of .8(b)?

24 JUDGE TRENGA: Of .8(b), yes.

25 MR. STERN: Okay. Are you referring to my

1 hand-up or the --

2 JUDGE TRENGA: No, it's not on your handout.

3 MR. STERN: Okay.

4 JUDGE TRENGA: It's the sentence that says,

5 This section does not affect the liability of any

6 person for any violation of Section 93120.2(a).

7 MR. STERN: To me that section says that the
8 retailer must comply with both (a) and (b). It's an
9 and. Compliance is an and and not an or requirement.

10 JUDGE TRENGA: It has to comply with (a) and
11 (b) of .8.

12 MR. STERN: I'm sorry. So .8(a) and .8(b).
13 And I don't think this is a disagreement between us and
14 plaintiffs. I think that both sides would say that
15 there is the emissions standard and there's the
16 reasonable prudent precautions standard, and that's how
17 I read that last sentence.

18 In other words, what I think it's saying, to
19 put it in more of a vernacular, is just because you
20 take reasonable prudent precautions doesn't mean that
21 you are absolved from also being subject to the
22 emissions standard of .8(a), which in turn incorporates
23 .2(a). That's my reading.

24 JUDGE TRENGA: I see. All right.

25 MR. STERN: It's been a long time since I've

1 done tax law, but the statute is reminiscent of a tax
2 statute in many ways. It's got a lot of defined terms,
3 and there's a lot of different actors and players.

4 By the way, in my handout, this is the one
5 way in which the handout diverges from the ATCM. I
6 bolded all the defined terms.

7 JUDGE TRENGA: That's fine. Thank you.

8 MR. STERN: Okay. So if you look at
9 requirements for retailers, what we find is there are
10 two requirements: You have to comply with .8(a), which
11 I believe does not have an independent content
12 requirement, and you need to comply with .8(b). Or put
13 it differently, to state a violation of the ATCM by a
14 retailer, you must allege an .8(a) and an .8(b)
15 violation.

16 So what does .8(a) require, and that, in
17 turn, requires that we take a look at .2(a), the
18 emissions standard. That's set forth in the second
19 page of my abbreviated handout, and this is what I
20 referred to earlier as a product standard. This
21 focuses on the product. .2(a) has two parts. The
22 first part is a prohibition on sales, and the second
23 part is a standard of when a product is not compliant.

24 So the first part, it says, No person shall
25 sell, supply, offer for sale, or manufacture for sale

1 in California any composite wood product which at the
2 time of sale or manufacture does not comply with the
3 emission standards in Table 1.

4 So in my handout, I've got a footnote,
5 Table 1 is an emissions standard that applies to the
6 core, just the MDF, not the finished product, the core,
7 which has two different standards depending on whether
8 we're talking about before or after January 2009. It's
9 the .11 standard.

10 So what the first part says is you can't sell
11 cores if at the time of sale they exceed .11 parts per
12 million. I'm going to talk in a minute about how we
13 don't sell cores and why that matters. So I'm kind of
14 foreshadowing a point I'm going to make in a moment,
15 but the prohibition on sales provision of .2(a) doesn't
16 apply to this case. This is one of our disagreements
17 with the plaintiffs.

18 The second part does. That does have an
19 application here. .2(a), the second part is a
20 noncompliance standard, and what it says is that a
21 product does not comply with the emissions standards in
22 Table 1 if -- and then it lists five things. The first
23 and the second are of no moment to this case because
24 the plaintiffs aren't relying on those.

25 The first, in my mind, I liken it to

1 paperwork violations. So in other words, if we were
2 buying cores from a company that wasn't third-party
3 certified or licensed, that would be a (1) violation.
4 They don't allege that that's a violation.

5 Likewise, they don't allege a (2) violation.
6 A (2) violation in my mind is when the manufacturer
7 itself does self-testing and it flunks the .11
8 standard. They don't allege that these flunk because
9 of a manufacturer's self-testing.

10 Of the five ways in which a product can be
11 noncompliant, three apply to cores and two apply to
12 finished goods. The first three apply to cores, CWP.
13 The second apply to finished goods. I'm going to come
14 back to this in a moment. Again, I'm foreshadowing.
15 But the plaintiffs contend that we flunk (3). That's
16 their claim, and they may also argue (4) or (5). I'm
17 going to come back to that in a moment. But right now
18 I just want to kind of lay out how the statute is
19 organized and the logic behind it.

20 So with that -- by the way --

21 JUDGE TRENGA: Well, they argue, don't they,
22 first, that it violates (4), which, in turn, depends on
23 a violation of (3)?

24 MR. STERN: They do argue (4), yes, and I can
25 address that. If you work yourself through this, (4)

1 says, A finished good -- which is what we sell. We
2 sell finished goods. If a finished good contains any
3 composite wood product which does not comply with the
4 emission standards in Table 1, based on the criteria
5 set forth in paragraphs (1), (2), or (3) above.

6 So you're right. A violation of (3) would
7 also be a violation of (4).

8 JUDGE TRENGA: If the finished good contains
9 a wood composite that doesn't comply with the emission
10 standards in Table 1, that means that a product doesn't
11 comply with the emission standards?

12 MR. STERN: That's right.

13 JUDGE TRENGA: And product refers to the
14 composite wood products?

15 MR. STERN: Maybe. It depends. The ATCM --
16 I was going to make this point, but you anticipated it,
17 Your Honor.

18 JUDGE TRENGA: Well, I guess I'm focused on
19 what a product means.

20 MR. STERN: Okay. Product is an ambiguous
21 term throughout the ATCM. Sometimes it means a
22 finished good. Sometimes it means the composite wood
23 product.

24 In (3) -- and this is important for what I'm
25 about to say in a moment. In (3), (3) applies just to

1 the core, just to the composite wood product. So the
2 term "product" in the preamble necessarily refers just
3 to the core when we're talking about (3) as opposed to
4 (4). (4) says a finished good contains a composite
5 wood product which does not contain. It sounds like
6 I'm splitting hairs here, but believe me. I'm not.

7 JUDGE TRENGA: No. That's the nature of the
8 statute.

9 MR. STERN: These terms are defined
10 carefully. Okay.

11 So in (4), to answer Your Honor's question,
12 product means a finished good that contains the core.
13 For (3), it's just the core.

14 JUDGE TRENGA: Well, I'm looking at (a), and
15 (a) says, No person shall sell, supply, and so on any
16 composite wood product which doesn't comply with
17 Table 1.

18 MR. STERN: Right.

19 JUDGE TRENGA: So (a) is limited to composite
20 wood products, correct? I'm sorry. That paragraph is
21 limited to composite wood products?

22 MR. STERN: That's our view.

23 JUDGE TRENGA: Right. Then it goes on to say
24 a product does not comply with Table 1.

25 MR. STERN: Yes.

1 JUDGE TRENGA: Wouldn't one necessarily have
2 to conclude that product is referring to composite wood
3 product?

4 MR. STERN: No. No.

5 JUDGE TRENGA: Because only composite wood
6 products can violate Table 1. So when you say a
7 product does not comply with Table 1, isn't that
8 necessarily referring to a composite wood product?

9 MR. STERN: Not necessarily. I'm reading it
10 very carefully here because precision is really
11 important.

12 JUDGE TRENGA: All right.

13 MR. STERN: I believe that the first part of
14 (a), the no person shall sell, that's what I referred
15 to earlier as a prohibition of sales, which I don't
16 believe is applicable here because that prohibition
17 only applies to people who sell cores. You can go to
18 lumberyards that will sell just cores, just MDF boards
19 that are not finished. We don't sell that, and they
20 don't allege that's what we sold. So my contention is
21 that the prohibition on the sales part of .2(a) is
22 inapplicable to this case.

23 What is applicable to this case is the
24 noncompliance standard, which is the second larger part
25 of .2(a). That says a product can flunk the compliance

1 standards in five ways. The first three are just core
2 ways, and the last two are finished product ways.

3 I'm not sure that helped.

4 JUDGE TRENGA: All right.

5 MR. STERN: So with that as a background, how
6 does the first amended representative class action
7 complaint stack up?

8 JUDGE TRENGA: Well, stay with me for a
9 moment on .2(a).

10 MR. STERN: Yeah.

11 JUDGE TRENGA: Under your theory, a retailer
12 could without liability sell a finished good that
13 contains a composite wood product that doesn't comply
14 with Table 1.

15 MR. STERN: Correct, unless --

16 JUDGE TRENGA: So why would you put (4) in?
17 What purpose does paragraph (4) play under your view of
18 the structure of this statute?

19 MR. STERN: Yes, a good question. A
20 retailer's sale of a finished good whose core violates
21 Table 1 is not in and of itself a violation of .2
22 unless that retailer failed to take reasonable prudent
23 precautions.

24 That gets us to .8(b). One of the reasonable
25 prudent precautions is did the retailer know that the

1 core it was buying was not compliant with Table 1, and
2 that could happen in a number of ways. Those
3 essentially are the five things in .2(a). That's why
4 there is a notice requirement. We call it a knowledge
5 requirement in our papers. It doesn't actually say
6 that, but it's reasonably inferred from --

7 JUDGE TRENGA: Well, under your
8 interpretation, you would end up with that view of the
9 statute's liability for a retailer even if you
10 eliminated paragraph (4), right? Paragraph (4) isn't
11 necessary to reach how you view -- what paragraph is
12 it? We just talked about it. I'm sorry. It's .8(b).

13 MR. STERN: If Lumber Liquidators sold just
14 cores, just MDF, (3) and (4) would still have
15 applicability here. What I think was going on in (1)
16 through (5) --

17 JUDGE TRENGA: How does (4) feed into the
18 meaning of .8(b)?

19 MR. STERN: Okay. All right. The way I
20 understand .8(a) and (b), the interplay, is that a
21 retailer has to take reasonable prudent precautions,
22 and those are described in .8(b).

23 JUDGE TRENGA: That would apply whether or
24 not the wood core violates the emissions or not --

25 MR. STERN: I'm going to come to that.

1 JUDGE TRENGA: -- under your view.

2 MR. STERN: Well, for purposes of .8(b), so
3 far that's correct.

4 So a retailer has to do two things: One, it
5 has to take reasonable prudent precautions, and that
6 means it has to make sure it does all the paperwork.
7 It has to do all of things that are described in .8(b).
8 It doesn't have to do testing, but it has to do all of
9 those things. Even if it does take reasonable prudent
10 precautions and does all of those things, it could
11 still be liable under .8(a) because that incorporates
12 .2(a) if it has knowledge that the cores it buys
13 violate (1) through (5) of .2(a).

14 JUDGE TRENGA: You're reading in the
15 knowledge requirement?

16 MR. STERN: That's a fair assessment. I am
17 reading the knowledge part. I think it's a fair
18 inference from .2(a) from the statute.

19 JUDGE TRENGA: All right.

20 MR. STERN: It doesn't say that.

21 JUDGE TRENGA: All right. I think I
22 understand your argument.

23 MR. STERN: All right. So how does the
24 representative class action complaint measure up to our
25 understanding of the ATCM? We contend that it fails on

1 three grounds and should be dismissed.

2 The first ground is a pretty simple one, and
3 that is the retailer liability provision of .8(b) says
4 you must follow reasonable prudent precautions, and
5 they never alleged that. They never even mention
6 .8(b), and they never allege that we failed to take
7 reasonable prudent precautions. So that's kind of an
8 easy on-off switch.

9 Two, this part is a little trickier. Two,
10 referring to .8(a), which incorporates .2(a) they never
11 allege a proper emissions standard violation of .2(a).
12 Okay. They contend in their opposition brief and they
13 hint in their amended complaint that we violate
14 .2(a)(3). That's the trigger they claim gives rise to
15 the emission violation, but that isn't an option. It
16 isn't an option because on its face, (3) applies to
17 composite wood products, which is a defined term. And
18 unless the Court is willing to read (3) to say
19 composite wood product or finished goods that contain
20 composite wood products, (3) is not an option.

21 JUDGE TRENGA: All right.

22 MR. STERN: They know how to say that, they
23 meaning CARB, the drafters of this. They know how to
24 say that because that phrase is found elsewhere in many
25 of the other provisions. They didn't say it. So (3)

1 is not an option to make a finding that we flunked the
2 emission standards of .2.

3 It also isn't an option -- by the way, the
4 Court had asked about (4) or (5). Let's go through it.
5 They don't claim they're relying on (1) or (2). (3) is
6 not an option, we believe, because we sell finished
7 goods. That's not disputed. We don't sell composite
8 wood products. So what about (4) and (5)?

9 JUDGE TRENGA: Let me ask this: Do you think
10 the meaning of the word "product" in .2(a) in the
11 prefatory sentence before (1) through (5), that the
12 light is shed on the meaning of the word "product" by
13 the definition of "product type" in paragraph 36 of the
14 definitional section?

15 MR. STERN: I thought about making that
16 argument. I don't know that it does. But if it does,
17 it actually corroborates our view, and the reason is
18 the product type goes on to talk about a composite wood
19 product, not a finished good.

20 JUDGE TRENGA: Correct.

21 MR. STERN: If anything, it would confirm
22 that when CARB wants to say composite wood product,
23 they do. When they want to say finished product, they
24 do. They're very careful about not letting the two
25 blur together.

1 JUDGE TRENGA: Let me ask you this: If you
2 were to read .2(a) to say instead of product -- if you
3 substitute composite wood product -- a composite wood
4 product does not comply with the emission standards in
5 Table 1 if and so on, does your interpretation of the
6 statute hold up under that reading?

7 MR. STERN: That interpretation wouldn't make
8 sense. Why? Because it goes on to set forth five ways
9 in which the product can flunk.

10 JUDGE TRENGA: Right.

11 MR. STERN: The first three are composite
12 wood products, and the second two are finished goods.

13 JUDGE TRENGA: Right.

14 MR. STERN: I think the only reasonable
15 reading of that prefatory word "product" is that it
16 could mean either composite wood product or finished
17 good depending on what the context of the (1) through
18 (5) say below that.

19 JUDGE TRENGA: But the definition of product
20 type refers only to composite wood product.

21 MR. STERN: Correct. But under that
22 interpretation, (4) and (5) wouldn't make sense.
23 Because what it would be saying is in the prefatory
24 language the composite wood product flunks the emission
25 standards, and then it would go on to say if the

1 finished good passed certain characteristics.

2 JUDGE TRENGA: Isn't it reasonable to say
3 that under (4), which feeds into (3), that a finished
4 good violates the emission standards just as a
5 composite wood product would violate the emission
6 standards if the finished good product contains a
7 composite wood product that violates the emission
8 standards as determined under (3)?

9 MR. STERN: Correct, that would be
10 reasonable. But that now gets into how do you find
11 that violation. That gets into the testing problem,
12 which I was just about to talk about.

13 JUDGE TRENGA: All right. You're saying
14 that's reasonable, and that's not your interpretation
15 of it?

16 MR. STERN: No. That is my interpretation.
17 That is my interpretation.

18 JUDGE TRENGA: So you read .2(a) as saying a
19 composite wood product does not comply with the
20 emissions standard if the finished good contains a
21 composite wood product that through testing, as
22 specified in (3), violates the emission standards?

23 MR. STERN: Yes, I would agree with that.

24 JUDGE TRENGA: Okay.

25 MR. STERN: So we're getting very close to

1 the core of what this case is about with Your Honor's
2 questions.

3 JUDGE TRENGA: And how do you understand that
4 position to be different from what the plaintiffs are
5 claiming?

6 MR. STERN: Well, it flunks for a different
7 reason. Well, first of all --

8 JUDGE TRENGA: It flunks because the
9 compliance method wasn't satisfied --

10 MR. STERN: Correct, yeah.

11 JUDGE TRENGA: -- under (3)?

12 MR. STERN: Yes.

13 JUDGE TRENGA: All right. Okay.

14 MR. STERN: So to kind of recap that very
15 quickly, (3) is not an option because it says composite
16 wood product. It doesn't say finished goods. That's
17 our position.

18 JUDGE TRENGA: Right.

19 MR. STERN: But what about (4) and (5)? They
20 don't allege that, but could they?

21 JUDGE TRENGA: Well, they don't rely on (5)
22 because it relies on the enforcement method, correct?

23 MR. STERN: As does (4). Now we get into the
24 testing question.

25 JUDGE TRENGA: All right.

1 MR. STERN: The testing question is who has
2 to do the testing. We know from .9 that all of the
3 different enforcement testing methods are preceded by
4 the requirement that that testing has to be done by ARB
5 or local air agency. Okay. Forget local air agency.
6 They're not --

7 JUDGE TRENGA: That's the enforcement method?

8 MR. STERN: Correct, yeah.

9 JUDGE TRENGA: Okay.

10 MR. STERN: So we know that testing to find a
11 failure under (4) and testing to find a failure under
12 (5) have to be done by ARB, and we know they weren't
13 here because plaintiffs allege -- they don't allege
14 they were.

15 JUDGE TRENGA: Right.

16 MR. STERN: Okay. In fact, they don't
17 dispute this. In their opposition, they pretty much
18 concede that the enforcement method has to be done by
19 ARB, and they're not relying on that.

20 What they are relying on -- and now we
21 finally do get to the nub of what this motion to
22 dismiss is all about. What they're saying is that
23 they're relying on .2(a)(3) which we've just talked
24 about, which allows for two different testing methods,
25 the compliance and the enforcement testing method. The

1 enforcement testing method has to be done by ARB.

2 JUDGE TRENGA: Right.

3 MR. STERN: They're not relying on that.

4 So what about the compliance test method?

5 That's what their entire claim now rides on. That's
6 not available. Because if you look at .9(a), which is
7 at pages 2 and 3 of my handout -- I'm sorry. I didn't
8 abstract the compliance test method. That's just the
9 enforcement test method.

10 They're now saying they did compliance
11 testing, not enforcement testing, and that this is
12 permissible to show a violation of (a)(3), but it's
13 not, first, because (a)(3) on its face only applies to
14 (4), not finished goods. ARB could have said finished
15 goods that have CWP as its core. They didn't. They
16 knew how to say that. They didn't. So that's a hard
17 stop. Two, compliance testing has to be testing
18 verified by a third-party certifier. That's a defined
19 term.

20 JUDGE TRENGA: All right.

21 MR. STERN: What they allege is they have
22 labs who are certified labs.

23 JUDGE TRENGA: All right.

24 MR. STERN: But being a certified lab is not
25 being a third-party certifier.

1 JUDGE TRENGA: That's what I want you to
2 focus on because that's what I understand your argument
3 to be, is that a lab certified by a third-party
4 certifier itself then can't be a third-party certifier
5 as to the emissions test.

6 MR. STERN: Okay. First of all, the
7 definition of third-party certifier is under .1(41),
8 and it describes the role that a third-party certifier
9 plays at three different things.

10 JUDGE TRENGA: Well, it talks about how you
11 become a third-party certifier.

12 MR. STERN: Correct.

13 JUDGE TRENGA: Maybe the evidentiary record
14 isn't sufficient, but why wouldn't these certified labs
15 have been approved as a third-party certifier under
16 .4(a)?

17 MR. STERN: Okay. Because they could very
18 well have been -- they could be wearing that hat quite
19 separately. They could be going to China from time to
20 time and doing inspections and audits.

21 JUDGE TRENGA: Where does it say you have to
22 be doing that to be a third-party certifier?

23 MR. STERN: It says that. I'm going to try
24 and be very clear.

25 JUDGE TRENGA: All right.

1 MR. STERN: The testing they rely on to show
2 that we failed (a)(3) is testing that was done by
3 certified labs, but it was forensic testing in aid of
4 class action litigation.

5 JUDGE TRENGA: I understand that, but why
6 does that disqualify it if it's done by a third-party
7 certifier?

8 MR. STERN: Yes, because --

9 JUDGE TRENGA: Because the testing has to be
10 done anytime after the manufacture.

11 MR. STERN: No. The testing --

12 JUDGE TRENGA: The compliance testing rather.

13 MR. STERN: Plaintiffs didn't do compliance
14 testing, and we know that. They did what CARB would
15 regard as inspection testing, the kind that accompanies
16 a facility visit. That's what this compliance testing
17 refers to. That testing is described in .9(a),
18 Compliance Test -- if you look at .9(a), it describes
19 the manufacturer's self-testing, which has to be done
20 under .9(a).

21 JUDGE TRENGA: Hold on a moment.

22 MR. STERN: I'm sorry. I'll wait.

23 JUDGE TRENGA: All right. It says compliance
24 testing shall be demonstrated by using one of the
25 following: The primary method, the secondary method.

1 And you're saying that the -- I guess there's an
2 alternative secondary test.

3 MR. STERN: Before we even get there, look at
4 the first paragraph of .9(a). This is what I'm relying
5 on.

6 JUDGE TRENGA: All right.

7 MR. STERN: .9(a) says, Compliance with the
8 emission standards for an MDF shall be demonstrated by
9 conducting product emissions tests verified by
10 third-party certification as specified in
11 Section 93120.4. Okay. If you go to 93120.4, that's
12 the section that deals with third-party certifiers.

13 JUDGE TRENGA: Right. That has to be a
14 third-party certification by someone who is certified
15 as a third-party certifier.

16 MR. STERN: Yes. Unfortunately, compliance
17 testing is not defined, but compliance testing that's
18 referred to in .4 is the compliance testing that
19 third-party certifiers do in aid of either doing their
20 job as auditors of the manufacturer or spot-checking
21 the manufacturer's compliance.

22 JUDGE TRENGA: Where do you get that from the
23 statute?

24 MR. STERN: Okay. That's through --

25 JUDGE TRENGA: Because the prohibition under

1 .2(a) is you can't sell anything that violates the
2 table at any time of the sale or manufacture. So
3 presumably, in order to determine whether you're in
4 violation of (a)(2) contemplates a point in time of
5 testing beyond the point of manufacture.

6 MR. STERN: All right. The compliance
7 testing of .9(a) says it has to be done in the manner
8 set forth in .4, and .4 talks about the responsibility
9 of the third-party certifiers. And third-party
10 certifiers are defined in .1(41).

11 JUDGE TRENGA: I'm looking for the
12 responsibilities of the third-party certifiers. It
13 talks about who they are and how you become one.

14 MR. STERN: That really is all there is.
15 It's in .4.

16 JUDGE TRENGA: Okay.

17 MR. STERN: What a third-party certifier
18 means under the definition of (41) is an organization
19 or entity approved by CARB that verifies the accuracy
20 of the emission test procedures and facilities used by
21 manufacturers -- that's not what these tests were.

22 JUDGE TRENGA: I'm sorry. Where are you
23 reading?

24 MR. STERN: I'm sorry. I'm now looking at
25 the definition of the third-party certifier.

1 JUDGE TRENGA: Right. That's in definitions?

2 MR. STERN: Yeah. It's .1(41).

3 JUDGE TRENGA: (41), right?

4 MR. STERN: Yes.

5 So to anchor this, the Court's question is

6 why weren't these certified labs who might very well be
7 wearing hats elsewhere as third-party certifiers, why
8 can't these tests qualify as compliance tests. That's
9 the question.

10 If you look at (41), the definition of a
11 third-party certifier, it means an organization
12 approved by CARB that:

13 (A) verifies the accuracy of the emission
14 test procedures and facilities used by manufacturers to
15 conduct formaldehyde emission tests. That's not what
16 these tests are. They don't allege that.

17 (B) monitors manufacturer quality assurance
18 programs. They don't allege that either.

19 And (C) provides independent audits and
20 inspections. They don't allege that either.

21 So whatever these tests were, we know they
22 were forensic tests in aid of litigation. We know they
23 were not third-party certifier tests that were done
24 pursuant to .4. That means they don't qualify as
25 compliance tests under .9(a). It's a mouthful.

1 JUDGE TRENGA: So how do you establish a
2 violation at the time of sale under .2(a)?

3 MR. STERN: There are a number of ways that
4 could be done.

5 JUDGE TRENGA: You'd have to have some
6 testing.

7 MR. STERN: You have to have testing.

8 JUDGE TRENGA: So who would do the testing if
9 it's not a third-party certifier?

10 MR. STERN: Well, we talked about
11 manufacturers have to do their own self-testing, and
12 that has to be verified through a third-party
13 certifier. That's not what's alleged here.

14 CARB can and does do enforcement testing.
15 That's not compliance testing. What CARB does is
16 enforcement testing.

17 JUDGE TRENGA: Doesn't your argument
18 necessarily mean that something that would satisfy
19 compliance testing is impossible after the
20 manufacturing process because under the definition of a
21 third-party certifier, a third-party certifier doesn't
22 exist for testing after the manufacturing of the
23 product? Because you're relying on the definition of
24 third-party certifier means an organization who
25 verifies the accuracy of the emission test procedures

1 and facilities used by manufacturers to conduct
2 formaldehyde emission tests. So if the testing occurs
3 after the process of manufacturing is completed, by
4 definition it can't have been done by a third-party
5 certifier.

6 MR. STERN: It can't. There are a number of
7 different ways that could happen.

8 JUDGE TRENGA: Okay.

9 MR. STERN: First, let's focus on CARB, what
10 would CARB do, and then we can talk about what the
11 plaintiffs have alleged. What CARB would do if they
12 had questions and wanted to do an audit, to do a
13 routine inspection, they would go to a retailer, like
14 Lumber Liquidators, and they would buy product.

15 JUDGE TRENGA: But that's CARB. That's not a
16 third-party certifier.

17 MR. STERN: Correct.

18 JUDGE TRENGA: Right. What I'm saying is
19 what ability is there for a third-party certifier to
20 test after the manufacturing process if your view of
21 the definition of third-party certifier is that it
22 includes only people who verify the accuracy of the
23 emission test procedures during the manufacturing
24 process and the facilities used by the manufacturer?

25 MR. STERN: The third-party certifier has

1 independent rights of audit. That's set forth in (41).

2 JUDGE TRENGA: Right.

3 MR. STERN: They could independently --

4 JUDGE TRENGA: Well, it says and provides
5 independent audits.

6 MR. STERN: So they could have done that.

7 They could have done that with the products these
8 plaintiffs bought.

9 JUDGE TRENGA: A third-party certifier?

10 MR. STERN: A third-party certifier could
11 have done that.

12 JUDGE TRENGA: Even if they hadn't done
13 what's listed in (a) and (b)?

14 MR. STERN: Yeah, because that's part of
15 their role. Their role is to police the *bona fides* of
16 the manufacturers and the fabricators. Let me try and
17 say --

18 JUDGE TRENGA: All right. So let's assume
19 that these laboratories were third-party certifiers.

20 MR. STERN: Okay.

21 JUDGE TRENGA: Well, who, then, is the
22 necessary universe of third-party certifiers?

23 MR. STERN: They are listed on the CARB
24 website. They are not people that we select.

25 JUDGE TRENGA: Right. It would be people

1 other than the people that qualify for enforcement
2 compliance.

3 MR. STERN: They could be the same people.

4 JUDGE TRENGA: They could be but --

5 MR. STERN: There's a short list of
6 laboratories that do this type of small chamber testing
7 that have been approved by CARB.

8 JUDGE TRENGA: So these certified
9 laboratories could be third-party certifiers?

10 MR. STERN: They could be.

11 JUDGE TRENGA: And they could have conducted
12 the required emission tests to satisfy the compliance
13 method -- I'm talking about theoretically now -- even
14 if they hadn't verified the accuracy of the emission
15 test procedures and facilities used by the
16 manufacturers to conduct formaldehyde emission tests or
17 monitored the manufacturing quality assurance programs?

18 MR. STERN: No. No. Let me put it a little
19 differently.

20 JUDGE TRENGA: So that's what I'm saying. If
21 you went into that definition where in order to be a
22 third-party certifier, you have to have performed all
23 three functions, just not the independent audit --

24 MR. STERN: No. No.

25 JUDGE TRENGA: -- no one could be a

1 third-party certifier once the manufacturing process
2 was done and the product was out of the factory.

3 MR. STERN: No. That's not what I'm relying
4 on. That's not what I'm saying.

5 JUDGE TRENGA: Okay.

6 MR. STERN: What I'm saying is once the
7 product is done and out of the factory --

8 JUDGE TRENGA: Right.

9 MR. STERN: -- the only method for testing
10 whether that finished good or the core flunk .2(a) is
11 the enforcement testing method. It's exclusive, and
12 that has to be done by CARB.

13 So to the Court's question, could CARB have
14 done compliance testing and issued a notice of
15 violation over these products, CARB couldn't do that.
16 These plaintiffs are asking you to do something that
17 CARB itself couldn't do, that is, use compliance
18 testing to find a violation under (3). CARB would have
19 had to use enforcement testing.

20 JUDGE TRENGA: So you're saying enforcement
21 testing is the exclusive method of testing after the
22 manufacturing process?

23 MR. STERN: Correct, and there's a reason for
24 that. By the way, there's a good reason for a lot of
25 these somewhat obscure sounding provisions, but the

1 reason for that is -- and this is evident in the
2 literature leading up to the promulgation. The reason
3 is that you have a core and you have a finished
4 product.

5 The enforcement or compliance testing that
6 we're talking about here is called the constructive
7 testing. What you do is you take the finished product.
8 You run it through a plainer. You take the veneer off,
9 and then you measure the emissions from the now
10 delaminated product. The theory behind deconstructive
11 testing is that the emissions that emanate from that
12 will approximate the emissions that emanated from the
13 unlaminated product.

14 But CARB recognized that there are errors in
15 the sample preparation and there are errors in
16 variability. So you can never truly restore a finished
17 product to its prelaminated state. CARB has generated
18 data on the relationship between the emissions that
19 come from a delaminated product versus the emissions
20 that come from the original MDF core. They have those
21 data, and they can adjust for that.

22 They hold those, and they are their trade
23 secret. They don't share that with other people. But
24 in bringing an enforcement action, they will rely on
25 those data. They will tell you this. It's not a

1 secret. I'm not making this up, and it's also all over
2 their website.

3 JUDGE TRENGA: How do you reconcile this
4 exclusivity view that the only available method for
5 testing after the manufacturing process is enforcement
6 testing with -- oh, I see. Okay.

7 Well, where it says compliance testing is an
8 available method of establishing emission tests under
9 .2(a), why would it say that if -- it doesn't seem to
10 be limited to the manufacturing process.

11 MR. STERN: Well, that's -- it doesn't say
12 that, but if you go through .2(a), those are -- the
13 five ways in which a product can flunk are those that
14 are listed in .2(a)(1) through (5).

15 JUDGE TRENGA: All right.

16 MR. STERN: You can't just make up a new kind
17 of test and say, oh, this is compliance testing. CARB
18 couldn't do that; yet, that's what's going on here.
19 That's our position.

20 JUDGE TRENGA: All right.

21 MR. STERN: I'm almost done.

22 JUDGE TRENGA: Take as much time as you like.

23 MR. STERN: This is not easy stuff, and the
24 Court's questions have been penetrating.

25 JUDGE TRENGA: All right.

1 MR. STERN: If there's any doubt about what a
2 retailer's obligations are -- and this has been a
3 detailed excursion we've taken through the ATCM just
4 now -- the doubt is really alleviated by CARB's own
5 fact sheet, which I prepared as a hand-up to the Court.
6 It's a two-page fact sheet. We refer to it in the
7 reply brief. It's on CARB's website. It is CARB's
8 plain language instructions to retailers about what
9 their requirements are.

10 What's notable about it -- let me just call
11 up what is notable about it, but it's largely notable
12 for what it doesn't do. What it doesn't do is what
13 plaintiffs say CARB requires, essentially a strict
14 liability standard. If you're a retailer and you sell
15 a finished good whose core exceeds .11, you are stuck.
16 That's plaintiffs' theory. It doesn't say that.

17 What it does -- and very quickly, the
18 call-ups are:

19 One, what is a retailer? To answer the
20 Court's earlier question, I think this explanation
21 would make Lumber Liquidators a retailer.

22 Two, what does the composite wood products
23 regulation require? And I refer the Court to the last
24 sentence: Retailers need to ensure when ordering
25 finished goods from a fabricator to request only

1 products that meet regulatory requirements and
2 composite wood products.

3 Notably, it doesn't say you need to do
4 testing. In fact, the only people that have to do
5 testing are manufacturers. I'm going to come back to
6 that in a moment, why that's important.

7 The next page: As a retailer, what should I
8 do to comply with the regulation? There are five
9 checks. Nowhere does it say you have to do periodic
10 testing. You have to do recordkeeping requirements.

11 By the way, these five checks, these are what
12 I believe CARB would regard as reasonable prudent
13 precautions under .8(b). They're telling you what
14 you've got to do.

15 The last call-out is midway through the
16 second page, what exemptions apply. The first
17 sentence: The regulation does not apply to finished
18 goods sold outside of California. I don't think that's
19 in dispute. It just applies to sales in California.

20 But the point of this fact sheet is that if
21 plaintiffs' theory were correct, you would think that
22 CARB would have agreed with that and would have said
23 that.

24 In conclusion on this first point, the
25 premise of the complaint is that retailers who sell

1 finished goods, whose composite wood product cores
2 flunk Phase 2 emission standards are strictly liable.
3 That can't be reconciled with four provisions of the
4 ATCM.

5 First, it reads out the reasonable prudent
6 precautions requirement of .8(b). Why would there be
7 such a requirement? Why would we care if you took
8 reasonable precautions? You're liable as long as the
9 cores you sell in your finished products violate .11.
10 That makes no sense. Courts shouldn't lightly read
11 entire provisions out of a regulation.

12 Two, to read it that way collapses the
13 definition of composite wood product and finished
14 goods. The regulation is very clear when they're
15 talking about the one and the other. Importantly, when
16 they're talking about finished goods that contain
17 composite wood products, plaintiffs' view collapses all
18 of this. Everything is a composite wood product.

19 Three, we referred in our reply brief to the
20 at-time-of-sale requirement. This reads out the
21 at-time-of-sale requirement. I'm not going to refer to
22 that other than to mention it's in our reply brief.

23 And five -- and maybe most importantly --
24 plaintiffs' interpretation puts retailers at a higher
25 standard than manufacturers. Manufacturers are the

1 ones who certify. They're responsible for getting
2 their products certified, for hiring third-party
3 inspectors. Under this view, retailers have an
4 inspection and a testing requirement that even CARB
5 says doesn't exist.

6 So we think the first amended representative
7 class action complaint doesn't meet the ATCM standards
8 for the three reasons I've mentioned.

9 JUDGE TRENGA: All right.

10 MR. STERN: The second point, if the Court
11 still has patience and bandwidth, I promise I can do
12 this more quickly.

13 JUDGE TRENGA: No. It's fine.

14 MR. STERN: I wanted to address whether the
15 complaint's affirmative misrepresentation allegations
16 measure up to the standing requirements of Article III
17 and the particularity requirements of Rule 9(b).

18 So just to recap quickly -- I know the Court
19 knows this -- the allegation that these products
20 violate the ATCM is unique to just the California class
21 because, as we've just seen, the ATCM doesn't apply
22 outside of California.

23 For outside California, plaintiffs have a
24 deception theory; namely, their theory is you
25 affirmatively misled people into buying by stating that

1 your products are safe, that you were in compliance
2 with California's requirements that are stringent, and
3 you didn't live up to that. That's their claim.

4 By the way, that deception claim also applies
5 to California, but the unlawful part of that is unique
6 to California. Everything else is a deception claim.

7 So a deception claim under whatever state law
8 is being invoked -- and here they're typically the
9 state Little FTC Acts in these five representative
10 states -- all require some version of a likely to
11 mislead standard. So the statement has to be likely to
12 mislead people.

13 Most of these state laws have a reliance and
14 a causation requirement. I'm not going to get down
15 into those weeds right now. That's all in the
16 briefing.

17 But I want to focus on the statements on
18 which they rely: Where do they reside? When were
19 those statements made? And what were those statements?
20 Because we think in this regard, the first amended
21 representative class action complaint doesn't measure
22 up.

23 So first, where do they reside? Plaintiffs
24 are relying on three statements: The CARB label that's
25 on the boxes of product that you buy when you get the

1 laminate; two, the website; and three, the warranty you
2 get post purchase once you buy the product from the
3 store. Those are the three things.

4 When were those statements alleged to have
5 been heard or when were the plaintiffs exposed to those
6 statements? Notably, nobody except the Ronquillos
7 claims to have seen the label prior to purchase. As
8 for the websites, only the Brandts and the Ronquillos
9 claim to have seen the websites prior to purchase. As
10 for the warranties, nobody alleges they saw or relied
11 on them.

12 Why does this matter? It matters because you
13 can't be deceived by something you didn't see. You
14 can't be deceived by something you saw only after the
15 deal closed and you bought it. You can't have standing
16 to sue over something that didn't cause you injury.
17 And if you didn't see it, it can't have caused you
18 injury.

19 All of that is briefed. I'm not going to
20 revisit that case law, but I did want to bring the
21 Court's attention to a decision that was handed down
22 yesterday, which I handed up prior to the hearing
23 today. Class counsel has a copy.

24 It's the *Gold v. Lumber Liquidators* case.
25 Very quickly, this is a nationwide class action pending

1 in the Northern District of California. The claim
2 involves bamboo product but not that the bamboo product
3 gives off formaldehyde in the emissions, rather that
4 the bamboo product isn't as durable as warranted or
5 that it buckles or -- it's a performance claim, not an
6 emissions claim.

7 And yesterday Judge Henderson issued a ruling
8 on a motion to dismiss which raised many of the same
9 issues. By the way, it was California law, New York
10 Little FTC Act, and he also issued a ruling on Illinois
11 law, which the plaintiffs were relying on all three.

12 Just very quickly, the two call-outs -- by
13 the way, as I told class counsel, there are aspects of
14 this ruling that are not favorable to other positions
15 I'm taking on the motion to dismiss. For example, the
16 injunctive relief motion to strike. Judge Henderson
17 reaches a different conclusion. So I'll be the first
18 to tell you that it's a mixed bag.

19 But on the issue of Article III in standing,
20 he rejects the position that plaintiffs are advancing
21 here, which I'll come to in a moment. But what he
22 finds for Article III -- and this is at page 7 of the
23 ruling. He grants Lumber Liquidators' motion to
24 dismiss because as to two of the plaintiffs, they
25 didn't allege any representations were made to them --

1 they didn't allege prior to purchase or made to them at
2 all, and they didn't allege which statements they heard
3 prior to purchase were material to their purchase
4 decision. That's at page 7.

5 By contrast, one of the plaintiffs, he
6 allowed that claim to stand. Why? Because when she
7 bought the product, she was told by a salesman in the
8 store, It's going to have these durability features.
9 It's going to do this and that. That's what she
10 alleges. That was allowed to stand. The two
11 plaintiffs who didn't allege what they heard prior to
12 the point of sale, he dismissed that with leave to
13 amend. But he dismissed it.

14 He also found at page 17 that the claims
15 about websites -- it's the same website as is alleged
16 here -- statements at trade shows, product retail
17 stores fails 9(b) -- he finds this at page 17 --
18 because they don't allege with particularity what they
19 heard, when they heard it, whether it was material, why
20 it was material, and prior to purchase is the critical
21 thing that Judge Henderson focused on.

22 Finally, starting at page 19, the court
23 reaches the same result on the New York claim and the
24 Illinois claim, which are also, by the way, alleged in
25 this case for much the same reason. Because those laws

1 are no different. They require these statements to
2 have been alleged with particularity, and they have to
3 have been alleged prior to purchase.

4 JUDGE TRENGA: Let me ask you about the prior
5 purchase issue. These are products like any other
6 product that's governed by the UCC to a certain extent;
7 aren't they?

8 MR. STERN: Right.

9 JUDGE TRENGA: Let's assume that the
10 plaintiffs don't physically see the label, the CARB
11 label, until it shows up at their doorstep. The
12 purchase isn't complete until they accept the goods
13 upon delivery, correct?

14 MR. STERN: I don't know that, but let's
15 assume for your question that's true.

16 JUDGE TRENGA: Right. So if they see the
17 label, which they allege was confirmatory of what they
18 understood, isn't it a reasonable inference that the
19 label induced their acceptance of the goods?

20 MR. STERN: By the fact that they didn't
21 return?

22 JUDGE TRENGA: That they didn't return or
23 reject the tender as nonconforming goods. I mean, they
24 just rejected it. We were told it was going to be
25 compliant. We knew there was supposed to be a label.

1 We looked. There was no label. So we would have done
2 something, including inquire about why there wasn't a
3 label.

4 MR. STERN: In theory, that might work except
5 you have to look at what does the website and what does
6 the label say. First of all, the label is the
7 fabricator's label. It's not our label. Two, what the
8 label simply says is that the --

9 JUDGE TRENGA: It's CARB compliant.

10 MR. STERN: Well, it doesn't say that. If
11 you actually look at the label -- that's what the
12 plaintiffs want you to think it says -- it's actually
13 gibberish. It's almost not understandable.

14 JUDGE TRENGA: The word "compliant" is in
15 there somewhere.

16 MR. STERN: But compliant with the procedural
17 requisites of the ATCM that we talked about.

18 JUDGE TRENGA: All right. I understand.

19 MR. STERN: It does not say the product is
20 safe.

21 By the way, the complaint alleges -- that's
22 what the complaint alleges, that we represented the
23 product is safe; yet, nowhere do we say that. In fact,
24 the warranty, which they do recite at page 47 -- I'm
25 sorry -- the website at paragraph 47, that accurately

1 says what we do represent; yet, they don't say that was
2 false. They don't say we didn't buy from a
3 manufacturer who wasn't certified. They don't allege
4 any of that.

5 So the only thing I would say, to address
6 very quickly the plaintiffs' opposition brief argument
7 to all of this, is the plaintiffs don't really take
8 issue with the fact that these plaintiffs didn't see
9 these things, they didn't rely prior to purchase. They
10 don't really fight that argument. Rather, what they're
11 saying is nobody has to have seen anything prior to
12 purchase. It's enough for them to allege, they say,
13 that if the public knew that Lumber Liquidators'
14 products contained many times the formaldehyde of its
15 competitors, that they wouldn't have paid as much or
16 they wouldn't have bought at all. That's their
17 argument, and that's what they say in their opposition
18 at page 15.

19 But from an Article III and a particularity
20 standpoint, consider what they just said. What they
21 are asking the Court to do is to find that Article III
22 is satisfied by first hypothesizing a group of
23 imaginary customers who could have relied on unread
24 statements and that created a market in which the price
25 of our products was inflated and people paid too much.

1 That theory is not sufficient to satisfy Article III.
2 Judge Henderson didn't think so. They have to allege
3 what they saw, that they saw prior to purchase, that
4 they relied, and that it was material. They just
5 haven't done that.

6 JUDGE TRENGA: Don't they also allege,
7 though, that under the unlawful prong of the unfair
8 competition law -- and I understand they allege that
9 part of the unlawfulness was the misrepresentations.
10 But isn't part of their theory also that they engaged
11 in unlawful conduct -- if you accept their theory, they
12 engaged in unlawful conduct by the fact of selling a
13 product that had a core that violated Table 1?

14 MR. STERN: Correct.

15 JUDGE TRENGA: There's no misrepresentation
16 element of that particular claim?

17 MR. STERN: That's correct. As I started
18 out --

19 JUDGE TRENGA: So that would mean you don't
20 need to have reliance on the warranties, the alleged
21 misrepresentations that they allege elsewhere?

22 MR. STERN: That's correct, but they only
23 allege that for the California class.

24 JUDGE TRENGA: Right. I understand.

25 MR. STERN: And nor could they go beyond

1 that. That was the point I made at the top of the
2 section by saying for California, they allege the
3 unlawful and deceptive. For the rest of the states,
4 it's just deceptive because they can't allege unlawful
5 at least as to the CARB violation.

6 JUDGE TRENGA: I understand.

7 MR. STERN: Your Honor, with that long-winded
8 soliloquy, I am done unless the Court has questions.

9 JUDGE TRENGA: All right. Let me hear from
10 the plaintiff.

11 Mr. Berman.

12 MR. BERMAN: Your Honor, do you want to take
13 a recess, or do you want me to just go?

14 JUDGE TRENGA: Ms. Montgomery, how are you
15 doing?

16 THE COURT REPORTER: I'm fine. Thank you.

17 JUDGE TRENGA: All right. Let's keep going
18 for a little bit longer.

19 MR. BERMAN: All right. I have a couple of
20 handouts if I may, Your Honor.

21 JUDGE TRENGA: All right.

22 MR. BERMAN: I have two copies of each.

23 MR. STERN: Your Honor, I'm going to have an
24 objection to one of them, but I'll wait until the
25 bailiff hands it up.

1 JUDGE TRENGA: All right.

2 MR. BERMAN: Okay. Your Honor, I would start
3 where you started. I'm on the yellow highlighted
4 sections of the regulations we've been looking at, and
5 I'm going to go to page 22. That is the Section .8(a)
6 and Section .8(b). Now, you asked Mr. Stern -- well,
7 as we know, Section .8(a) says that the emission
8 standards apply to all retailers. All retailers must
9 comply with the requirements of .2(a) for all composite
10 wood products and finished good products containing
11 these materials. I think it's beyond dispute that the
12 products at issue here are composite wood products and
13 finished goods containing composite wood. So .8(a) and
14 .2(a) clearly apply to Lumber.

15 So that gets us to (b). You immediately
16 focused on the very last sentence of (b) and asked,
17 Well, doesn't that mean that (a) is stand-alone, that
18 you have to still comply with (a) in addition to (b)?
19 And Mr. Stern says, Well, I'm reading it. They must've
20 intended that they be read together. But I don't think
21 that's a fair reading of the regulation because it says
22 on its face, This section does not affect the liability
23 of any person for any violation of Section 93120.2(a).

24 Then if you look at the very heading of
25 .8(b), it says Additional Requirements. Well, the word

1 "additional" has to mean in addition to those that
2 Lumber had to comply with in .8(a). And it says,
3 Additional requirements to help ensure that complying
4 composite wood products and finished goods are
5 purchased. Retailers must do various things.

6 Well, it makes sense because it's the
7 retailer that ultimately is placing this product in
8 front of the consumer. So the regulators here want
9 retailers to do more than anyone else. In addition to
10 complying with (a), they have to take care of (b). So
11 (b) is not a safe harbor. Lumber is liable if it
12 violated (a).

13 So let's take a look at (a), and that's on
14 page 8. You're probably sick of looking at it, but it
15 says, A finished good contains any composite wood
16 product which does not comply with the emission
17 standards.

18 There's no question that the products here at
19 issue are composite wood products because
20 Section 93120.1(a)(8) defines composite wood products
21 to include medium density fiberboard. That's the
22 product at issue in this case.

23 And finished goods at 93120.1(a)(15) is
24 defined as any good or product containing medium
25 density fiberboard, which, again, is this product.

1 And Section 93120.1(a)(25) defines the word
2 "laminate product," and it includes a finished good in
3 which if the platform consists of a composite wood
4 product, meaning an MDF core, the platform must comply
5 with the applicable emission standards.

6 So clearly, Section (4) applies to Lumber. I
7 think Mr. Stern -- after all the very nice
8 construction, when you asked him the question, he said
9 that's correct. So then he went to -- really, his
10 point is that we haven't alleged a violation of the
11 regulations because we have not alleged a proper
12 violation of the compliance test method, and this gets
13 into the certified laboratory issue.

14 But before I go to that, if we thought that
15 Section (b) was the only section that applied, we
16 allege in paragraph 11, paragraph 49, paragraph 55, and
17 paragraph 60 -- 11, 49, 55, and 60 -- that Lumber
18 Liquidators knew that the boards it was buying from
19 China were not CARB compliant. So we're alleging a
20 violation of .8(b) even if we had relied on .8(b),
21 which we don't.

22 But then let's turn to this testing issue. I
23 think you're right that the statute or regulation
24 allows for the testing at any time after it is
25 manufactured. And so then the testing by whom? Well,

1 in paragraph 43 of the complaint, we allege that
2 between June 2013 and January 2015, at least three
3 separate laboratories accredited by the International
4 Accreditation Service conducted tests of 134 samples in
5 compliance with CARB, specifically ASTM D 6007-02.
6 That's the very regulation in part 9 that Mr. Stern was
7 referring to.

8 JUDGE TRENGA: And you contend that the
9 certified laboratories are third-party certifiers?

10 MR. BERMAN: I don't know that, but I do know
11 that we alleged that they complied with the
12 requirements of ASTM D 6007-02.

13 JUDGE TRENGA: Is that enough if they're not
14 a third-party certifier?

15 MR. BERMAN: Well, if you read the rest of
16 the statute -- or the rest of that regulation,
17 Section (B) and so forth, it would seem that you
18 couldn't be doing the testing unless you were
19 evidencing that you met the requirements because (b)
20 says --

21 JUDGE TRENGA: You're looking at which
22 section?

23 MR. BERMAN: Well, I start with (A): The
24 secondary method shall be operated using the testing
25 conditions and loading rates --

1 JUDGE TRENGA: Are you under .9?

2 MR. BERMAN: Yes, Your Honor. I'm looking at
3 (A) under .9.

4 So we allege compliance with (A), and I don't
5 know sitting here today if you comply with (A) you're
6 necessarily certified. It would seem like you would
7 have to be, but I don't know that. But I'm not sure we
8 need to get there for this reason, and the reason is
9 the following:

10 We allege in the complaint that *60 Minutes* --
11 I'm sure you're aware -- did testing of Lumber's
12 product. And *60 Minutes* went to Lumber's certified
13 laboratory Benchmark and had Benchmark conduct the
14 testing. So they're certified under the statute, and
15 the test flunked.

16 So even if the plaintiffs' tests weren't by a
17 certified laboratory, *60 Minutes* went to a certified
18 laboratory, and the complaint alleges they flunked. So
19 we've --

20 JUDGE TRENGA: But you have the same issue,
21 whether it could meet the definition of a third-party
22 certifier.

23 MR. BERMAN: That's what they did for Lumber.
24 They are one of Lumber's certified laboratories, and
25 that's why *60 Minutes* went to them.

1 JUDGE TRENGA: I see.

2 MR. BERMAN: And so we've -- to summarize our
3 position on the statute under .8(a), they clearly have
4 a stand-alone obligation to not violate the emission
5 standards. We allege that they violated the emission
6 standards. We allege that various labs, including the
7 Benchmark lab used by *60 Minutes*, found that Lumber
8 Liquidators had failed the CARB regulations.

9 That gets me to the last point I want to
10 make, Your Honor, and that's the following:

11 I'm going to refer briefly to the document.
12 It's marked confidential. I'll try to do that in a way
13 that -- well, I don't think I'm violating the
14 protective order.

15 JUDGE TRENGA: Is this what you have an
16 objection to?

17 MR. STERN: I do, Your Honor, for two
18 grounds: One, this is a motion to dismiss, and
19 evidence, particularly evidence I've been handed an
20 hour before, a document that was produced, has no role
21 in it. We didn't bring it up. It is not part of their
22 opposition. Two, it's subject to a protective order,
23 and I think we'd have to close the court and shut off
24 the phone.

25 JUDGE TRENGA: All right.

1 MR. BERMAN: It's relevant to two points,
2 Your Honor. I won't say what's in the document. One,
3 it goes to -- if Your Honor thinks we haven't alleged
4 compliance or a violation of the statute -- a grounds
5 for amendment that will clearly allow us to allege
6 violation of the statute.

7 JUDGE TRENGA: I'm going to consider it. I'm
8 not going to put on the record what it is at this
9 point. Let me just read it.

10 Without getting into the substance on the
11 record of this document, Mr. Berman, you think this is
12 supportive of your view that if the Court found in some
13 fashion the complaint inadequate, it would allow for
14 appropriate amendments or for some other purpose?

15 MR. BERMAN: Two things, Your Honor: Number
16 one, it casts doubt on the argument made here today
17 that the entire regulatory scheme doesn't apply to --

18 JUDGE TRENGA: All right.

19 MR. BERMAN: Clearly, the regulator thinks it
20 does.

21 JUDGE TRENGA: I understand. That's
22 basically your response to Mr. Stern's reliance on the
23 composite wood products fact sheet?

24 MR. BERMAN: Yes.

25 JUDGE TRENGA: All right.

1 MR. BERMAN: And second, Your Honor, it goes
2 to -- we would allege violation of the enforcement
3 standards as well now because that's -- without saying
4 more.

5 JUDGE TRENGA: All right.

6 MR. BERMAN: Okay. Then that's all I have
7 for the statute.

8 I would like to address one of the points
9 made by Lumber, and that goes to the injunctive relief
10 claim. On that, Your Honor, I would ask the Court to
11 pay attention. There's a lot of material you've
12 gotten, but I think really important is the -- I can't
13 even say it, so I'll just spell it,
14 S-H-A-H-I-N-I-A-N -- *Shahinian v. Kimberly-Clark* case.
15 It's a 2015 case. The defendant --

16 JUDGE TRENGA: Do you have a cite?

17 MR. BERMAN: Yes, I do. It's 2015 WL
18 4264638.

19 JUDGE TRENGA: 426 --

20 MR. BERMAN: 4264638.

21 JUDGE TRENGA: Thank you.

22 MR. BERMAN: What the defendants have argued
23 here is because our plaintiffs, after they bought the
24 product, now know that the product was not as
25 represented, they don't have standing to bring claims

1 for injunctive relief. That court citing a Second
2 Circuit case and several other cases, I think, hit the
3 nail on the head. The court said, If the court were to
4 construe standing as narrowly as the defendant
5 advocates, federal courts would be precluded from
6 enjoining false advertising because a plaintiff who had
7 been injured would always be deemed to avoid the cause
8 of the injury thereafter, once bitten, twice shy, and
9 would never have Article III standing.

10 That's the basis of their motion, that you
11 can't seek an injunction now that you know the truth.
12 That case and the cases cited in there say you do have
13 standing to seek an injunction. So that's the only
14 point I wanted to make on that.

15 JUDGE TRENGA: All right.

16 MR. BERMAN: That's all I have, Your Honor.

17 JUDGE TRENGA: All right. Mr. Stern,
18 anything?

19 MR. STERN: Just very briefly.

20 MR. BERMAN: I think Ms. --

21 JUDGE TRENGA: Oh, I'm sorry. Ms. Fineman.

22 MS. FINEMAN: Thank you, Your Honor. Nancy
23 Fineman addressing two issues.

24 JUDGE TRENGA: Yes.

25 MS. FINEMAN: On the dec relief, it's our

1 position that there is still ongoing potential for the
2 sale, and even though it doesn't dispose of the entire
3 action, the Court has discretion to allow the dec
4 relief to proceed.

5 As to the issue about the standing and the
6 .9(b), we do believe that, number one, the unlawfulness
7 applies not only to the California statutory claims but
8 also to all of the warranty claims. So it's important
9 for the unlawful prong, but as to the specificity of
10 the representations --

11 JUDGE TRENGA: How does that feed into the
12 non-California cases?

13 MS. FINEMAN: For just the idea that because
14 you have a noncompliance with CARB, they've represented
15 that there's CARB compliance even --

16 JUDGE TRENGA: What they've said is it's
17 misleading without further disclosure.

18 MS. FINEMAN: Or it's still a breach of the
19 warranty because it's not as represented for the
20 non-California cases.

21 Specifically, as to the representations, we
22 do believe that we have satisfied both the standing
23 requirements and the .9(b) requirements. Mr. Stern
24 said that we only were looking at -- increase the
25 pricing, so we relied on the representations. That is

1 a sub-argument, but we do believe -- and if you start
2 at paragraph 69 and walk through each of the
3 plaintiffs -- that we've shown that each of them did
4 have reliance on representations.

5 And I think what our dispute is is how
6 specific does a pleading have to be. I'd suggest that
7 the Court look at the *Kwikset* case, K-W-I-K-S-E-T,
8 which is cited in the briefs.

9 JUDGE TRENGA: All right.

10 MS. FINEMAN: It's California Supreme Court
11 case 51 Cal. 4th 310, and especially page 327. And
12 this was a case about whether the Made in USA label
13 could support a 17200. Our California Supreme Court
14 said, At the pleading stage, general factual
15 allegations of injury resulting from the defendant's
16 conduct may suffice. For on a motion to dismiss, we
17 presume that general allegations embrace those specific
18 facts that are necessary to support the claim.

19 Then the court cites to the *Lujan* case, a
20 U.S. Supreme Court case.

21 So for each of our plaintiffs, we allege that
22 the representations that they saw were the reason that
23 they purchased.

24 I think Your Honor's point that they
25 purchased and then used -- because it's not just buying

1 the lumber, it's installing it at their home. Until
2 it's installed in their home, it's not really the
3 purchase of it and they still can return it.

4 The only difference is with *Balero*. It's not
5 as specific as to what he saw, but the allegations
6 starting in paragraph 91 is that he wanted a safe
7 product and he's a California resident where it could
8 not be sold. So he had the expectation that there's
9 going to be something that is compliant with the law
10 that he purchased.

11 And we in California are very aware of having
12 environmentally friendly regulations in kind of all
13 aspects. So we believe that even him that doesn't
14 specifically have a website has it.

15 And the difference between what is the
16 affirmative misrepresentation between the misleading,
17 they both are really the same -- different sides of the
18 same coin. We believe that the website is factually
19 inaccurate but also misleading if it's not found to be
20 an affirmative misrepresentation.

21 And for all of the state's laws, the fact
22 that you start to speak, you have a duty to speak the
23 whole truth, and there are emissions because of what
24 they failed to do.

25 So unless you have questions about -- because

1 Mr. Stern just focused in on a couple of the issues he
2 wanted. There's something I wanted to raise that we
3 didn't cover, but if Your Honor didn't --

4 JUDGE TRENGA: That's fine. Did you want to
5 address some other issues?

6 MS. FINEMAN: There's nothing that I wanted
7 to address. I just didn't want it to be defined by
8 what Mr. Stern did. In case you had questions, I was
9 prepared to address any.

10 JUDGE TRENGA: That's fine. Thank you.

11 Is that it for the plaintiffs, Mr. Toll?

12 MR. TOLL: That's it, Your Honor.

13 JUDGE TRENGA: All right. Yes, Mr. Stern.

14 MR. STERN: Thank you, Your Honor. I will
15 keep these comments brief.

16 To Mr. Berman's point about the dialogue you
17 and I had and he had with the Court about the testing
18 and whether the labs were certified and the question
19 confronting the Court is whether that's the same as the
20 compliant testing done by a third-party certifier, I
21 have this brief comment: The compliance testing that's
22 contemplated in the ATCM, as its name implies, is to
23 test for compliance as the material is being
24 manufactured at the site of manufacture before it's
25 shipped. It's to arrest emissions violation in the

1 process.

2 And it makes sense that that has to be a TPC,
3 a third-party certifier, because CARB wants to make
4 sure that the entity it deputizes to be the policeman
5 of these emissions is somebody that it has confidence
6 in and it has certified to do this testing.

7 If you think about smog emissions testing,
8 you want to make sure that the state licenses the guys
9 who check the emissions from your car because they,
10 after all, are the final stopgap before, you know, cars
11 are unleashed on the road that may potentially pollute.
12 So they have to be licensed, and their equipment needs
13 to be calibrated and validated so that their measuring
14 is proper. Okay. That's what compliance testing is.

15 And to the Court's question about (a)(3) and
16 why that is the only provision that applies at the time
17 of manufacture, that's exactly why they do require
18 third-party certification.

19 So what the plaintiffs are trying to do is do
20 what CARB would consider to be enforcement testing, and
21 only CARB can do that.

22 JUDGE TRENGA: I understand --

23 MR. STERN: That part you understand.

24 JUDGE TRENGA: Well, I understand the
25 argument and why it makes sense within the structure of

1 the regulation. What I'm struggling with, though, is
2 how -- and this applies to a number of other points
3 that really cut both ways. There are various pieces
4 here and there that are difficult to reconcile with
5 what you would otherwise think the structure of the
6 statute would have the regulations say.

7 I'm focused on, again, Subsection (3) of
8 .2(a), which says that you can establish a failure to
9 comply with emission standards by testing at any time
10 after it is manufactured using either the compliance
11 test method or the enforcement method. So if the
12 compliance test method was for the purposes of ensuring
13 compliance during the manufacturing process, you
14 wouldn't expect to see that as an option in (3) for any
15 time after manufacture.

16 MR. STERN: Well, actually, I think it does
17 make sense.

18 JUDGE TRENGA: Okay.

19 MR. STERN: Because from the standpoint of
20 CARB, which is the regulator, they could use compliance
21 testing, and they could actually probe further either
22 of a retailer or a manufacturer and decide, Okay, so we
23 looked at your compliance tests. We find that X
24 numbers of them exceed .11. How many lots did you
25 sell? How many came from that lot? How many came from

1 Manufacturer X versus Manufacturer Y? This is the kind
2 of investigation that CARB does.

3 Then they can issue stop orders. There's a
4 lot of remedies they have, and some of those are -- and
5 the point being at any time would make sense to allow
6 CARB that latitude to arrest that process from that
7 manufacturer. If they're going to enforce --

8 JUDGE TRENGA: So CARB can do compliance
9 testing?

10 MR. STERN: Well, no.

11 JUDGE TRENGA: All right.

12 MR. STERN: TPCs, third-party certifiers.

13 JUDGE TRENGA: That's my point. The fact the
14 definition of third-party certifier, which you were
15 arguing --

16 MR. STERN: Yes.

17 JUDGE TRENGA: -- by its definition is
18 somebody who is verifying the emissions during the
19 manufacturing process --

20 MR. STERN: That's right.

21 JUDGE TRENGA: Here you have specifically a
22 reference to compliance testing, which would require a
23 third-party certifier, involved in measuring emissions
24 after the manufacturing process. That's what it says,
25 at any time after it is manufactured. So how do you

1 reconcile all of that?

2 MR. STERN: Well, all right. Retailers and
3 other actors in the downstream distribution can sell
4 MDF. They don't have to just sell finished goods. We
5 happen to only sell finished goods.

6 JUDGE TRENGA: All right.

7 MR. STERN: And so if you were to go to a
8 lumberyard and pick up a piece of MDF, you could do
9 that compliance testing, quote, at any time, unquote,
10 and that could still be compliance testing.

11 JUDGE TRENGA: Who could do that?

12 MR. STERN: Potentially --

13 JUDGE TRENGA: There is no third-party
14 certifier that could do it.

15 MR. STERN: It's possible. I'm theorizing.

16 JUDGE TRENGA: The definition of third-party
17 certifier, as I understand your interpretation of it --

18 MR. STERN: It could under (c), meaning as
19 part of its audit and inspection process.

20 JUDGE TRENGA: It's not disjunctive. It's A,
21 B, and C. It's somebody who, (A), verifies; (B), does
22 something else; and (C), performs the audit. It's not
23 somebody who does one of those things.

24 MR. STERN: No. But I would argue that a
25 third-party certifier of Manufacturer X has the

1 authority not only to do compliance testing at the
2 factory but also in theory could buy sample product in
3 this country and do compliance testing.

4 JUDGE TRENGA: I guess you could read it to
5 mean somebody who was approved to do all of these
6 things but that doesn't necessarily have to do them
7 all.

8 MR. STERN: I read it to mean that these are
9 the functions that a third-party certifier is approved
10 to perform.

11 JUDGE TRENGA: To perform, not that he
12 necessarily has to do those?

13 MR. STERN: Correct.

14 JUDGE TRENGA: Okay.

15 MR. STERN: All right. Thankfully, enough on
16 that point. I'm going to move on.

17 Very quickly, to Ms. Fineman's two points, to
18 respond to Ms. Fineman's arguments, she made reference
19 to the warranty claim and specifically referring to the
20 Court's comment during my discussion about how the
21 failure of a consumer to return a product may be
22 during -- after delivery could constitute reliance on a
23 CARB label. Okay. And Ms. Fineman adopted that
24 argument and suggested that the complaint can stand
25 under that interpretation.

1 But the problem is you have to go back to
2 what the warranty is that they allege. They're not
3 clear on what the warranty is. We now know from their
4 opposition that the CARB label is not the warranty.
5 They said that at page 28 of their opposition.

6 Interestingly, what they quote in the amended
7 complaint at paragraph 47 is not the retail warranty
8 that customers get. That's the commercial purchase
9 order that Lumber Liquidators demands of its
10 manufacturer. Somehow they found that, and they are
11 claiming that this is the retail consumer warranty.
12 It's not what it is.

13 JUDGE TRENGA: This is the purchase order
14 between Lumber Liquidators and its --

15 MR. STERN: Correct. This is the
16 representations and warranties that the commercial
17 manufacturers -- the wholesale manufacturer gives to
18 Lumber Liquidators. That's not a warranty a consumer
19 ever sees. We addressed this in the opening. They
20 didn't correct this in the opposition. The Court, I
21 think, needs to assume they have no answer to that.

22 So the point being, whatever this notion is
23 that a consumer's acceptance post delivery constitutes
24 reliance on a statement begs the question what's the
25 statement.

1 JUDGE TRENGA: I understand.

2 MR. STERN: Finally, Ms. Fineman referred to
3 the *Kwikset* decision, the California Supreme Court
4 decision that suggests that there may be a more relaxed
5 particularity requirement. That's a California Supreme
6 Court decision. The California Supreme Court doesn't
7 get to decide pleading requirements in federal court
8 and in this exact issue was faced by Judge Henderson
9 yesterday in the *Gold* case. And Judge Henderson, I
10 think, correctly said, I'm governed not by California
11 pleading law but by -- there it was Ninth Circuit law.

12 Thank you, Your Honor.

13 JUDGE TRENGA: Thank you. I want to
14 compliment both counsel for helping the Court work
15 through this.

16 I'm going to take it under advisement, and I
17 will get a decision to you just as soon as I can.

18 Yes, Mr. Berman.

19 MR. BERMAN: Your Honor, very briefly, I
20 referred to the *60 Minutes* --

21 JUDGE TRENGA: Come to the podium.

22 MR. BERMAN: Sorry. I just want to make it
23 easier for you, and I neglected -- I referred to the
24 fact that we alleged that *60 Minutes* sent samples to a
25 certified laboratory, and that is at paragraph 10.

1 JUDGE TRENGA: All right. Thank you.

2 All right. Counsel is excused.

3 We'll stand in recess.

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5 Time: 3:51 p.m.

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I certify that the foregoing is a true and
22 accurate transcription of my stenographic notes.
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/s/

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Rhonda F. Montgomery, CCR, RPR